

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

KERRY HICKS,

Petitioner,

No. CIV S-02-1040 LKK JFM P

vs.

TOM CAREY, Warden,

Respondent.

ORDER

Petitioner, a state prisoner proceeding through counsel, has timely filed a notice of appeal of this court's March 13, 2006 denial of his application for a writ of habeas corpus. Before petitioner can appeal this decision, a certificate of appealability must issue. 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

A certificate of appealability may issue under 28 U.S.C. § 2253 “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). The certificate of appealability must “indicate which specific issue or issues satisfy” the requirement. 28 U.S.C. § 2253(c)(3).

A certificate of appealability should be granted for any issue that petitioner can demonstrate is “‘debatable among jurists of reason,’” could be resolved differently by a different court, or is “‘adequate to deserve encouragement to proceed further.’” Jennings v. Woodford,

290 F.3d 1006, 1010 (9th Cir. 2002) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 (1983)).¹

Petitioner has made a substantial showing of the denial of a constitutional right in the following issues presented in the instant petition: (1) the state courts deprived petitioner of his right to a defense by refusing to instruct the jury that petitioner reasonably believed that the complaining witness consented to accompany petitioner; and (2) the state court's finding that the admission of uncharged prior offenses was harmless error was an unreasonable application of federal law and had a substantial and injurious effect on the verdict.

Accordingly, petitioner's motion for certificate of appealability will be issued in the present action.

Petitioner is a state prisoner proceeding through counsel with an appeal from this court's denial of his application for writ of habeas corpus pursuant to 28 U.S.C. § 2254. In light of the complexity of the legal issues involved, the court has determined that the interests of justice require continued appointment of counsel before the appellate court. See 18 U.S.C. § 3006A(a)(2)(B); see also Weygandt v. Look, 718 F.2d 952, 954 (9th Cir. 1983).

Accordingly, IT IS HEREBY ORDERED that:

1. A certificate of appealability is issued in the present action.

2. Petitioner's March 17, 2006 motion for appointment of counsel is granted; John Ward, attorney at law, is appointed to represent petitioner on appeal.

DATED: March 28, 2006.

/s/Lawrence K. Karlton
UNITED STATES DISTRICT JUDGE

/hick1040.830

¹ Except for the requirement that appealable issues be specifically identified, the standard for issuance of a certificate of appealability is the same as the standard that applied to issuance of a certificate of probable cause. Jennings, at 1010.